NO. 52401-5-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

RICKY RAY SEXTON,

APPELLANT,

-V-

STATE OF WASHINGTON,

APPELLEE.

P/M: 2/11/19

APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS RAP 10.10

Pierce County Case No. 17-1-00988-3

By: [signature]

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1. Mr. Sexton's attorney stipulated to Mr. Sexton having a prior "serious offense," five days after the prosecutor spoke of the "serious offense," in his opening statement. This violated the rule set forth in State v. Humphries, and counsel provided ineffective assistance by agreeing to such.

2. Counsel was ineffective for stipulating to Mr. Sexton having a prior "serious offense" as an element of unlawful possession of a firearm in the first degree, and should have requested the lesser charge of unlawful possession of a firearm in the second degree.

3. Mr. Sexton did not have a prior "serious offense," and his attorney provided ineffective assistance of counsel by having him stipulate to a prior "serious offense."

4. Mr. Sexton received ineffective assistance of counsel when his attorney failed to reconcile conflicting statutes in a manner favorable to the defendant under the rule of lenity.

5. Mr. Sexton was denied effective assistance of counsel when his attorney failed to move for a mistrial, and failed to object to prosecutorial misconduct.

6. Mr. Sexton was denied effective assistance of counsel when his attorney stipulated to a prior offender score, without any investigation, when a previous court had found charges to be same criminal conduct.

7. The cumulative errors of defense counsel require reversal as Mr. Sexton has been prejudiced by counsel's performance.

Issues Pertaining to Supplemental Assignment of Errors

1. Did Mr. Sexton receive effective assistance of counsel when his attorney had him stipulate to a prior "serious offemse," five days after the prosecutor spoke of such in his opening statement, forcing Mr. Sexton to acquiesce to what had already occurred, as found in Humphries?

2. Was defense counsel ineffective in allowing Mr. Sexton to stipulate to having a prior "serious offense," as an element of unlawful possession of a firearm in the first degree, instead of requesting a lesser charge of unlawful possession of a firearm in the second degree?

3. Was defense counsel ineffective by allowing Mr. Sexton to stipulate to having a prior "serious offense," when none of Mr. Sexton's prior offenses constitute a "serious offense" as defined within the Sentencing Reform Act (SRA) RCW 9.94A?

4. Mr. Sexton had a prior conviction for burglary in the second degree. Under RCW 9.41.040(4)(a), burglary in the second degree is considered a "crime of violence," and thus considered a "serious offense" under RCW 9.41.010(24). Under the SRA (RCW 9.94A.030(55), burglary in the second degree is not a "violent offens." In addition, the scoring sheet for burglary in the second degree specifies it as being a "property crime." Is there a conflict among our statutes? And was defense counsel ineffective for having Mr. Sexton stipulate that he had a prior "serious offense," amid such an obvious conflict, when the rule of lenity would have favored his client?

5. The prosecutor trivialized the State's burden of proof by using a puzzle analogy, urging the jury to disregard certain elements, and equating possession with Mr. Sexton's residence being located in Washington State. Was defense counsel ineffective for not moving the court for a mistrial? Or at a minimum objecting to such obvious prosecutorial misconduct?

6. A court had previously found two of Mr. Sexton's prior offenses to be same criminal conduct. Was it reasonable and effective assistance of counsel for Mr. Sexton's attorney to stipulate to Mr. Sexton's prior offenses not being same criminal conduct, when it caused his client to face significantly more time in prison?

7. Does the cumulative error doctrine apply in Mr. Sexton's case, when the errors of counsel caused him to be convicted of a class B crime as oppossed to a class C crime, and be sentenced with a lower offender score based on a previous appellate court's ruling?

I. INTRODUCTION

Ricky Ray Sexton was charged and convicted of 4 felonies stemming from a military-style home invasion by a Pierce County SWAT team on March 9, 2017. Here are the felonies:

Count I -Unlawful Possession of a Controlled Substance with Intent to Deliver (Methamphetamine) RCW 69.50.401(1)(2)(b)

Count II -Unlawful Possession of a Controlled Substance with Intent to Deliver (Methlyphendate) RCW 69.50.401(1)(2)(c)-I

Count III -Unlawful Possession of a Controlled Substance (Oxycodone) RCW 69.50.4013(1)

Count IV -Unlawful Possession of a Firearm in the First Degree RCW 9.41.040(1)(a)

CP 137-138.

Appellate counsel filed an opening brief. He raised the following issues: (1) police violated the "knock and announce" rule; (2) probable cause did not exist for issuance of a warrant; (3) the trial court violated Mr. Sexton's right to represent himself; (4) the court issued improper jury instructions; and (5) the court committed various sentencing errors.

Mr. Sexton raises additional grounds on appeal. These include the following: (A) ineffective assistance of counsel for stipulating to an element of a crime, instead of requesting a lesser crime; (B) ineffective assistance of counsel for not objecting to prosecutorial misconduct; and (C) ineffective assistance of counsel for stipulating to an incorrect offender score; and (D) cumulative errors require reversal.

II. ARGUMENT

A. Mr. Sexton Was Denied His Sixth Amendment Right To Effective Assistance Of Counsel.

1. Legal Standards

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984).

Claims of ineffective assistance of counsel are reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the defendant must show both (1) that defense counsel's representation was deficient, and (2) that the deficient representation prejudiced the defendant. State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011); Strickland, 466 U.S. at 685-86. Representation is deficient if after considering all the circumstances, the performance "falls below an objective standard of reasonableness." Grier, 171 Wn.2d at 33 (quoting Strickland, 466 U.S. at 688). Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have differed. Grier, 171 Wn.2d at 34.

An appellant faces a strong presumption that counsel's representation was effective. See Grier, 171 Wn.2d at 33. Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

"Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's performance.'" Grier, 171 Wn.2d at 33 (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). The defense counsel's strategic decisions must be reasonable. Grier, 171 Wn.2d at 34.

A defendant establishes prejudice by showing that there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. Grier, 171 Wn.2d at 34. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Grier, 171 Wn.2d at 34 (quoting Strickland, 466 U.S. at 694-95).

The prejudicial effect of counsel's errors must be considered cumulatively rather than individually. Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1515, 146 L. Ed.2d 389 (2000); Harris v. Wood, 64 F.3d 1432, 1438-39 (9th Cir. 1995).

Even though the issues raises herein were not objected to by trial counsel during trial, they are nonetheless properly presented for the first time on appeal as ineffective assistance of counsel. RAP 2.5(3)(a) allows the appellate court to review manifest errors affecting a constitutional right for the first time on review.

B. Counsel Was Ineffective For Having Defendant Stipulate To An Element Of Unlawful Possession Of A Firearm In The First Degree, And Failing TO Request A Lesser Charge Of Unlawful Possession Of A Firearm In The Second Degree.

On Count #4, Mr. Sexton was charged with the Unlawful Possession of a Firearm in the First Degree, which should have included a lesser offense of Unlawful Posession of a Firearm in the Second Degree, had Defense Counsel requested such. As noted in 13B WASH. PRACTICE, Fine & Eade, Sec. 2807, p.193 (Thomson Reuters, 1998 w/2013-14 Supp):

> Second degree unlawful possession of a firearm is an offense of a lesser degree than first degree unlawful possession of a firearm. Consequently, an instruction on the second degree offense can be given when there is evidence that the defense committed only the lesser.

The court instructed the jury that Mr. Sexton had a prior "serious offense." CP 73, Jury Instruction 21, 22. In order to be convicted of first degree unlawful possession of a firearm, Mr. Sexton needed this prior "serious offense." CP 73, 2/27/18 RP 112.

In Mr. Sexton's case, his attorney had him stipulate that he had a prior "serious offense," a necessary element of the Unlawful Possession of a Firearm in the First Degree. This was done on 2/27/18. CP 47. The prosecutor spoke of the stipulation to the prior "serious offense" in his opening statement. 2/22/18 RP 59 & 62. However, at that time Mr. Sexton had not signed any stipulation. CP 47. Mr. Sexton signed the stipulation on February 27, 2018, five days after the prosecutor informed the jury of such, and just prior to the State resting it's case. 2/27/18 RP 112-13. This violated the rule set out in State v. Humphries, 181 Wn.2d 708, 336 P.3d 1121 (2014), in which a

defendant was convicted of Second-Degree Assault with a firearm enhancement and First-Degree Unlawful Possession of a Firearm. The Court of Appeals affirmed and the Supreme Court accepted discretionary review.

The Supreme Court held that: (1) as a matter of first impression, the trial court could not accept defense counsel's stipulation to a fact that satisfied an element of unlawful possession of a firearm; (2) the signature by defendant on the stipulation did not constitute an informed and voluntary waiver of his constitutional rights; and (3) the error in the trial court accepting the stipulation was not harmless.

In this case, a stipulation that the parties agree to Mr. Sexton having a prior "serious offense" was not discussed with the court until February 27, at which time it was signed by Mr. Sexton, his counsel, and the prosecutor, and entered into the record. 2/27/18 RP 112. However, the stipulation was announced to the jury by the prosecutor twice in his opening statement, five days prior to being signed by Mr. Sexton. 2/22/18 RP 59 (during the course of this trial you'll receive evidence that it was unlawful for him to possess that firearm in the first degree because he had previously been convicted of a felony offense that is defined under Washington law as a serious offense.) See also 2/22/18 RP 62 (Finally, the State anticipates that you'll also hear evidence in this case that as a basis for count IV, unlawful possession of a firearm in the first degree, the defense has previously been convicted of a felony offense which qualifies as a serious offense, and

that his possession of a Sig Saure handgun was unlawful per se.) Even though Mr. Sexton had subsequently signed the stipulation after the prosecutor made his opening statement it was nothing other than a "forced acquiescence to what had already occurred," as found in Humphries, and counsel was ineffective for allowing him to do such.

The only possible prior conviction that Mr. Sexton has that could be construed as a "serious offense" would be his 2001 conviction for Burglary in the Second Degree. CP 108. However, RCW 9.41.030 gives a definition of "serious offense", which does not include Burglary in the Second Degree:

> (24) "Serious offense" means any of the following felonies or a felony attempt to commit any of the following felonies, as now existing or hereafter amended:
>
> (a) Any crime of violence;....[1]

RCW 9.41.030(4)(a), in turn, defines "crime of violence" as including Burglary in the Second Degree. This conflicts with RCW 9.94A.030(55), which does not include Burglary in the Second Degree in its definition for "violent crime." Thus, RCW 9.94A.030(55) conflicts with RCW 9.41.010(4)(a) - under RCW 9.94A.030(55) a person does not have a violent criminal history with a prior Burglary in the Second Degree, but under RCW 9.41.010(4)(a) he does.

Mr. Sexton was denied effective assistance of counsel under the Sixth Amendment when his attorney failed to research the relevant law and bring to the court's attention the conflict in the statutes as outlined above. The statutes are clearly

1 - RCW 9.94A.030(55) contains a definition for "violent crime" which does not include Burg 2.

in conflict, and that conflict would have been resolved in favor of Mr. Sexton under the rule of lenity, had his attorney brought it up instead of having Mr. Sexton stipulate to an element of the crime. "A statute is ambiguous if it can be reasonably interpreted in more than one way." State v. Mullins, 128 Wn. App. 633, 642, 116 P.3d 441 (2005). "If the language of a penal statute is ambiguous, the courts apply the rule of lenity and resolve the issue in a defendant's favor." State v. Knutson, 64 Wn. App. 76, 80, 823 P.2d 513 (1991).

Thus, Burglary in the Second Degree is not included in the statutory definition of "serious offense" as stated within RCW 9.41.030(24). The State will likely argue that Burglary in the Second Degree is a "crime of violence" under RCW 9.41.010 although RCW 9.94A.030(55) says that Burglary in the Second Degree is not a "violent offense." There is no denial that there is a conflict in these statutes.

As noted in Washington Practice, "the situation will be relatively rare such as where there is a genuine factual controversy about whether the predicate offense qualifies as a 'serious offense' or as some other felony or designated misdemeanor." 13B WASH. PRAC, Fine & Eade, sec. 2807, at ftnte. 1. Mr. Sexton believes that the issue is present in this case, and counsel was ineffective for not bringing it to light.

Since there was a genuine issue as to whether Mr. Sexton had a prior "serious offense", whereas the only possible "serious offense" was his 2001 conviction for Burglary in the Second

Degree being considered as a "crime of violence," for purposes of a predicate offense for unlawful possession of a firearm in the first degree, a stipulation should not have been entered, and the jury should not have been given a binding instruction that Mr. Sexton had a prior "serious offense." Mr. Sexton's attorney was ineffective for not requesting a lesser offense of unlawful possession of a firearm in the second degree due to the conflicting statutes and rule of lenity.

An act or omission made by defense counsel may, however, be excused if there is any legitimate tactic or strategy that would justify the failure. Strickland, 466 U.S. at 690. No such tactical or strategic decision justifies counsel's failure to seek a legally justifiable lesser charge. No reasonable attorney would fail to seek a lesser charge, that would cut his client's potential prison term in approximately half, and no theoretical reason for counsel to do such could hardly be imagined.

Mr. Sexton was deprived of his Sixth and Fourteenth Amendment right to effective assistance of counsel. State v. A.N.J., 168 Wn.2d 91, 111-112, 225 P.3d 956 (2010). Sexton's case must be reversed with instructions to vacate the charge of Unlawful Possession of a Firearm in the First Degree, since he did not have the requisite predicate "serious offense."

C. Mr. Sexton Was Denied His Right To Effective Assistance Of Counsel When His Attorney Failed To Object To Prosecutorial Misconduct.

1. The Prosecutor Misstated The Law In A Manner That Prejudiced Mr. Sexton.

The due process clause of the Fourteenth Amendment protects the right of every criminal defendant to a fair trial before an impartial jury. U.S. Const. Amends. V, XIV; Wash. Const. art. I, sections 3,21,22. The Fourteenth Amendment also "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). Arguments that shift or misstate the burden of proof from the State to the defendant constitute misconduct. State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014). The requirement that the government prove a criminal charge beyond a reasonable doubt, along with the right to a jury trial, has consistently played an important role in protecting the integrity of the American criminal justice system. Blakely v. Washington, 542 U.S. 296, 301-02, 124 S. Ct. 2531, 159 L.Ed.2d 402 (2000); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000).

2. Prosecutors have special duties which limit their advocacy.

A prosecutor has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a "substantial likelihood exists that the comments affected the jury." State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993) (holding that in the absence of a defense objection, reversal for prosecutorial misconduct in closing argument is required only if the misconduct was so prejudicial that it could not have been cured by an objection and appropriate curative instruction).

3. The Prosecutor's Use Of A Puzzle Analogy Trivialized The State's Burden Of Proof.

In his closing argument, the prosecutor used the well-worn and often appealed "puzzle analogy" to trivialize and minimize the State's burden of proof:

> Because a trial in many ways is kind of like a jigsaw puzzle. You receive evidence not all at once, but piece by piece. I told you what the picture on the front of the box is and over the course of this trial you've been getting pieces. The question now is whether or not there are a sufficient number of pieces to put the puzzle together. Respectfully, I submit, that based on the charges in this case, there is, and the charges in this case have been proved beyond a reasonable doubt.
>
> 2/28/18 RP 13

Although the prosecutor did not articulate the need for a specific quantifiable portion of the "puzzle" that the jury needed in order to establish proof beyond a reasonable doubt, the analogy was nonetheless improper when read in context with

the rest of the prosecutor's closing argument, like when he urged the jury to disregard an element of the crime, and equate possession with Mr. Sexton's residence being located in the State of Washington:

> I'm going to skip the next element and get to the last one. The third element is whether or not this occurred in the State of Washington. Ladies and gentlemen, just like with possession, I don't think this is a close call. I don't think there is any testimony in the record before you to indicate that the events you have received testimony regarding from March 9, 2017 occurred anywhere other than the defendant's residence in Pierce County, Washington State.
>
> 2/28/18 RP 16

The puzzle analogy coupled with the prosecutor equating possession with Mr. Sexton's residence being in Washington State trivialized the burden of proof in the extreme, essentially relieving the state of the need to meet the burden of proof on anything other than the defendant residing in the State of Washington.

This Court has repeatedly held that trivializing the reasonable doubt standard by analogizing it to everyday decisions is prosecutorial misconduct. In Anderson, the court held that a prosucutor's comments discussing the reasonable doubt standard in the context of everyday decision-making were improper because "the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case." 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).

State v. Johnson, expounded on Anderson, holding that prosecutorial commentary comparing reasonable doubt to making

an affirmative decision based on a partially completed puzzle was erroneous and improper because it trivialized the State's burden, focused on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict without a reason not to do so. State v. Johnson, 158 Wn. App. 677, 685, 243 P.3d 936 (2010). In Johnson, this court held that a puzzle analogy, combined with the State's advising the jury it must "fill in the blank" to find reasonable doubt, were flagrant and ill-intentioned prosecutorial misconduct, incurable even by a limiting instruction.

Arguments by the prosecution that misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct. State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006). This misconduct was compounded by the puzzle analogy being augmented by the prosecutor's urging the jury to ignore an element and essentially find the defendant guilty because he lives in Washington State.

Our courts have clarified the standard of prejudice that Sexton must meet in this situation as the "ordinary prejudice" standard as set forth in Lindsay had defense counsel moved for a mistrial based upon the improper closing argument. However, counsel did not move for a mistrial (or object), which alone is a basis for ineffective assistance of counsel. 180 Wn.2d 423, 326 P.3d 125 (2014).

4. Defense Counsel Failed To Move For A Mistrial Based Upon Prosecutorial Misconduct.

The request for a mistrial during closing arguments preserves for appellate review issues of misconduct. See U.S. v. Prantil, 764 F.2d 548, 555 n.4 (9th Cir. 1985) (mistrial motion following prosecutor's closing is "an acceptable mechanism by which to preserve challenges to prosecutorial misconduct"). Moreover, federal courts have held that comments at the end of a prosecutor's rebuttal closing are more likely to cause prejudice. See U.S. v. Sanchez, 659 F.3d 1252, 1259 (9th Cir. 2011) (significant that prosecutor made improper statement "at the end of his closing rebuttal argument after which the jury commenced it's deliberations."); U.S. v. Carter, 236 F.3d 777, 788 (6th Cir. 2001) (significant that "prosecutor's improper comments occurred during his rebuttal argument and therefore were the last words from an attorney that were heard by the jury before deliberations").

Had Sexton's counsel moved for a mistrial at the time of the prosecutor's puzzle analogy and accompanying argument that trivialized and relieved the State from proving the elemtns of the crime, the court likely would have at least considered the motion under the more favorable standard as articulated in Lindsay. Counsel's deficient performance has prejudiced Mr. Sexton, and his conviction must be reversed because his attorney failed to move for a mistrial based upon prosecutorial misconduct. Strickland, 466. U.S. at 690.

5. Counsel's Failure To Object To Prosecutorial Misconduct Prejudiced Mr. Sexton.

Defense counsel should have at least objected when the prosecutor used the "puzzle analogy" and other arguments which minimized and trivialized the state's burden of proof. The failure to object cannot be characterized as a tactical decision. The defense gained no benefit from allowing the prosecution to use an improper closing argument that relieved the state of the burden of proving all elements of the crimes beyond a reasonable doubt, and trivialized the reasonable doubt standard as found in Johnson and Lindsay.

Counsel's failure to object to the State's "puzzle analogy" and accompanying argument deprived Mr. Sexton of his Sixth and Fourteenth Amendment right to effective assistance of counsel. State v. A.N.J., 168 Wn.2d at 111-112. Sexton's convictions must be reversed and remanded for a new trial. Id. at 91.

D. Mr. Sexton Was Denied His Right To Effective Assistance Of Counsel When His Attorney Stipulated To Prior Offenses And Failed To Conduct A Same Criminal Conduct Analysis.

Mr. Sexton further requests that he be resentenced so that the trial court can take into account his prior offenses being counted as 2 instead of 4, pursuant to a "same criminal conduct" analysis.

The offender score establishes the standard range term of confinement for a felony offense. See RCW 9.94A.530(1); RCW 9.94A.525. The sentencing court calculates an offender score by adding current offenses and prior convictions. RCW 9.94A.589(1)(a).

"A defendant's offenses must be counted separately when determining the offender score unless the trial court finds that some or all of the offenses 'encompass the same criminal conduct.'" State v. Anderson, 92 Wn. App. 54, 61, 960 P.2d 975 (1998); see also RCW 9.94A.589(1)(a). If the sentencing court finds "that some or all of the offenses encompass the same criminal conduct then those offenses shall be counted as one crime." RCW 9.94A.589(1)(a).

"Same criminal conduct" is defined as "two or more crimes that require the same criminal intent, are committed at the same time, and involve the same victim." RCW 9.94A.589(1)(a). The absence of any of these elements precludes a finding of "same criminal conduct." State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

Appellate courts review determinations of same criminal conduct for abuse of discretion or misapplication of the law. State v. Graciano, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013). "Under this standard, when the record supports only one conclusion on whether crimes constitute the 'same criminal conduct,' a sentencing court abuses its discretion in arriving at a contrary result." Id. at 537-38. The defendant bears the burden of proving the crimes constitute the same criminal conduct. Id. at 539.

At Mr. Sexton's sentencing, the prosecutor filed a "Statement of Prior Record and Offender Score," listing seven alleged prior felony convictions. CP 103-105. The prosecutor listed three convictions from 1996, 1997, and 1999, which the

State said washed out. 5/4/18 RP 19. Of the remaining four prior felonies that did not wash out, the State's position was that Mr. Sexton's convictions from 2001, for burglary in the second degree and theft of anhydrous ammonia, both counted towards his offender score. 5/4/18 RP 19-20. The State also counted Mr. Sexton's two prior counts of unlawful possession of a controlled substance with intent to deliver, which he was convicted of in 2008. 5/4/18 RP 20; CP 103-105. The State's calculation amounted to Mr. Sexton having a prior offender score of four. 5/4/18 RP 21.

Mr. Sexton's attorney admittedly "failed to point out in his sentencing memorandum," anything regarding Mr. Sexton's prior offender score, and "didn't know what the State's position on washing was." 5/4/18 RP 27. Ironically, although Sexton's attorney did argue that Mr. Sexton's two current counts unlawful possession of a controlled substance with intent to deliver constituted "same criminal conduct," he did not bother to look into Mr. Sexton's prior offenses being same criminal conduct. 5/4/18 RP 27. The State conceded that the two current counts of unlawful possession with intent were in fact same criminal conduct, and that Mr. Sexton was thus entitled to be sentenced with an offender score of 7 as opposed to 8.

It would be a reasonable assumption that if Sexton's two current counts of possession with intent were same criminal conduct, then Mr. Sexton's prior two counts of possession with intent, would also be considered same criminal conduct, since

the two prior counts of possession with intent happened on the same day and same time, as confirmed by the "Statement of Prior Record and Offender Score. CP 105. Indeed, had Mr. Sexton's counsel bothered to investigate his client's prior criminal history, it would have been clear that Sexton's 2008 conviction for two counts of possession with intent, stemmed from the same incident, at the same time, and involved the same controlled substance. See State v. Sexton, 2009 Wash. App. LEXIS 1936 (August 3, 2009), No. 61721-4-I, King County Superior Court No. 07-1-00506-1. These two prior offenses should have been counted as one under the same criminal conduct analysis. It was clear error for defense counsel to stipulate to anything else.

Additionally, in Mr. Sexton's prior case for two counts of possession with intent, the State conceded on appeal that Mr. Sexton's prior offenses for burglary in the second degree and theft of anhydrous ammonia, constituted the same criminal conduct under RCW 9.94A.589(1)(a). See State v. Sexton, No. 64821-7-I (2010), WL 2365646 at *1, *2. Thus, Mr. Sexton's prior conviction for burglary in the second degree and theft of anhydrous ammonia, had already been found by Division One to have constituted same criminal conduct. Whether law of the case doctine is applicable or not, Mr. Sexton's attorney should have conducted a reasonable investigation into his client's prior offenses before agreeing to stipulate to an offender in which significantly prejudiced his client.

Because Mr. Sexton's counsel did not argue at sentencing that his prior offenses constituted same criminal conduct, that argument may be waived on appeal. State v. Brown, 159 Wn. App. 1, 16-17, 248 P.3d 518 (2010), review denied, 171 Wn.2d 1015 (2011). Nevertheless, because the claim of error is of constitutional magnitude, Mr. Sexton may claim ineffective assistance of counsel for the first time on appeal. State v. Greiff, 141 Wn.2d 910, 924, 10 P.3d 390 (2000). A defendant may raise the issue of same criminal conduct for the first time on appeal in the context of an ineffective assistance of counsel claim, even if he did not raise the argument in the trial court. State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004). "The failure to make a same criminal conduct argument is prejudicial if the defendant shows that with the argument the sentence would have been different." State v. Munoz-Rivera, 190 Wn. App. 870, 887, 361 P.3d 185 (2015); see also Strickland, 466 U.S. at 694.

Mr. Sexton's prior offender score should have been 2, not 4. His attorney failed to conduct an adequate (or cursory) investigation into his prior offenses, and instead stipulated to an offender score, which caused Mr. Sexton significantly more time in prison. It can hardly be said that he received effective assistance of counsel in this regard. This Court should find that Mr. Sexton did not have effective assistance of counsel, and thus reverse his convictions and remand for a new trial, with new counsel.

E. **Cumulative Errors Require Reversal For Mr. Sexton.**

A conviction will be reversed on appeal if an independent review shows that cumulative errors resulted in a trial that was fundamentally unfair. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, clarified, 123 Wn.2d 737, 870 P.2d 964 (1994). The cumulative error doctrine applies "when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." Greiff, 141 Wn.2d at 929. To obtain this relief, the appellant must identify the numerous egregious errors and show how the prejudiced their trial. Lord, 123 Wn.2d at 332.

Such cumulative error is present in the case at Bar. Indeed, had Mr. Sexton's attorney not stipulated to Mr. Sexton having a prior "serious offense," and instead argued the crimes in Mr. Sexton's past only allowed him to be charged with Unlawful Possession of a Firearm in the Second Degree, he would have had a sentence of approximately half of what it was for the possession of a firearm in the first degree. Additionally, had counsel conducted any reasonable investigation into his client's past offenses, he would have found that an appellate court had already ruled that two prior charges constituted same criminal conduct. Again, allowing for Mr. Sexton to be exposed to a much less severe prison term. It can hardly be imagined anything more prejudicial to a defendant.

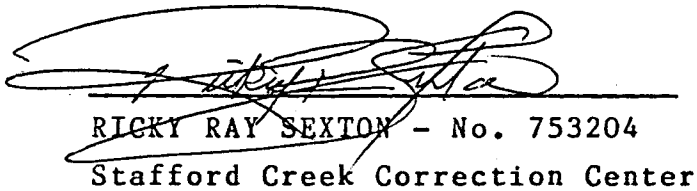
Since the prejudicial effect of counsel's errors must be considered cumulatively rather than individually, this Court should rule that Mr. Sexton was denied the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. Williams, 120 S. Ct. at 1515; Strickland, 466 U.S. at 686; also Harris, 64 F.3d at 1438-39.

III. CONCLUSION

Mr. Sexton was denied effective assistance of counsel and significantly prejudiced as set forth above. Mr. Sexton respectfully asks this Court to reverse his convictions and remand for a new trial. In the alternative, the case should be remanded for resentencing based on a past score of 2 instead of 4 based on the same criminal conduct, which the court had found previously applicable.

Dated this 7th day of February, 2019.

Respectfully submitted,



RICKY RAY SEXTON - No. 753204
Stafford Creek Correction Center
191 Constantine Way
Aberdeen, WA 98520

Accountability Letter Bank

A Writing Guide

Department of Corrections
WASHINGTON STATE

When Writing Your Accountability Letter

You are taking a positive step toward accepting responsibility for your actions. Please consider these questions when writing your letter.

- ☑ **Are you ready?** Writing an accountability letter is voluntary. You have nothing to gain except personal growth and insight. The victim may never request to read the letter. Submitting this letter will not affect your custody level, parole eligibility, release date, or conditions of supervision. Before you write the letter consider whether you have accepted full responsibility for your crime and the cause effects. The process of writing this letter may help you become more honest about yourself and your intentions.
- ☑ **Are you remorseful?** Are you truly sorry for the harm you caused or do you feel sorry for yourself because you are being held accountable?
- ☑ **Do you expect the victim to forgive you?** If you expect forgiveness, you are writing the letter for your own benefit, not the victim's. Do not ask the victim to forgive you, as it places the responsibility on the victim to meet your needs.
- ☑ **Do you make excuses for your actions?** If you make excuses you have not fully accepted responsibility for your actions.
- ☑ **Do you blame the victim, others or your circumstances for the crime?** If so, you are not ready to submit a letter.
- ☑ **What have you done to change your life?** The victim may want to hear about programs or activities in which you have participated to help positively impact your attitudes and behaviors.

Helpful Hints for Writing Your Letter

- ☑ **Make sure that your handwriting is legible.** If your handwriting is difficult to read, consider typing the letter.
- ☑ **Avoid long rambling letters.** It is best to be clear and to the point.
- ☑ **Do not preach your religious beliefs.** It may be appropriate to tell the victim that your faith is helping you to change your life, but it is not appropriate to try to force your beliefs on the victim.
- ☑ **Ask for help with writing your letter.** If you are struggling, ask a trusted friend, chaplain or corrections staff person to assist.
- ☑ **Put your draft letter aside for a while.** When you come back to it later, you may want to make changes.

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DECLARATION OF SERVICE BY MAIL
GR 3.1

I, Ricky Ray Sexton, declare and say:

That on the 8th day of Feb., 2019, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 52401-5-II:

Brief of Statement of Additional Grounds. RAP 10.10;

;

;

addressed to the following:

Pierce County
Office of Prosecuting Attorney
Criminal Division
955 Tacoma Ave So
Suite 301
Tacoma, Wash 98402

Court of Appeals
Division II
950 Broadway
Suite 300
Tacoma, Wn. 98402

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 8th day of Feb, 2019, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Signature

Ricky Ray Sexton
Print Name

DOC 753204 UNIT H-3 B-61L
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520

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DIVISION II
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